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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. AB-1036

**THE CITY OF CHICAGO, IL
- ADVERSE ABANDONMENT -
- CHICAGO TERMINAL RAILROAD IN CHICAGO, IL**

**RESPONSE OF CHICAGO TERMINAL RAILROAD
TO PETITION FOR PARTIAL WAIVER OF
ABANDONMENT REGULATIONS AND
FOR EXEMPTIONS**

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Submitted By:

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Dated: June 30, 2009

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INTRODUCTION

Pursuant to 49 CFR 1152.24(e)(5) and 49 U.S.C. 10502(a), the City of Chicago ("Chicago" or "the City") petitioned the Board on June 10, 2009, for partial waiver of and for exemptions from certain abandonment regulations and statutory provisions so that it could file an "adverse abandonment" application at a future date to abandon a line of railroad owned and operated by the Chicago Terminal Railroad ("CTR"). CTR vigorously objects to the City's actions for the reasons stated in the Argument section of this Reply and intends to submit a Protest in accordance with the schedule to be set in this proceeding.

The two railroad lines that the City seeks adverse abandonment authority for include:

* The Kingsbury Branch between its point of connection to the Goose Island Branch north of North Avenue and its terminus at the junction of Division and Halsted Streets ("Kingsbury Segment" or "Kingsbury Branch"); and

* a portion of the Lakewood Avenue Line between the south right-of-way line of Clybourn Avenue and the terminus of that Line at Diversey Parkway ("Lakewood Avenue Segment").

CTR submits with this Reply a verified statement from its President Edwin Ellis with two maps of the subject trackage appended to his statement.

The specific regulations and provisions that Chicago seeks a waiver for or exemption from include:

- 49 CFR 1152.21 (form of public notice requirements)
- 49 CFR 1152.20(a)(2)(i) (service of notice upon significant users)
- 49 CFR 1152.20(a)(2)(xii) (service of notice upon labor organizations)
- 49 CFR 1152.20(a)(3) (posting of notice at each station and terminal)
- 49 CFR 1152.10-14, 1152.24(e)(1) (System Diagram Map requirements)
- 49 CFR 1152.22(a)(5) (contents of application to include System Diagram Map)
- 49 CFR 1152.22(b)-(d) (contents of application to include a description of the condition of line, service performed, and traffic, cost, and revenue information)
- 49 CFR 1152.24(f), 1152.29(e)(2) (consummation-related)

- 49 CFR 1152.22(f), 49 CFR 1105 (environmental and historic regulations)
- 49 U.S.C. 10904 and 49 CFR 1152.27 (offer of financial assistance provisions and regulations)
- 49 U.S.C. 10905 and 49 CFR 1152.28-9 (public use and interim trail use)

BACKGROUND

CTR is one of six operating class III short line railroads owned by Iowa Pacific Holdings, LLC ("IPH"), thorough its wholly-owned subsidiary Permian Basin Railways, Inc. ("Permian"). Both IPH and Permian are respected members of the short line railroad community well known to the Board through a series of proceedings. Among others, IPH-owned short line railroads have been chosen by shipper groups as their operating carrier in Alternative Rail Service and Feeder Line Application proceedings to provide service over rail lines where the incumbent carrier has been providing inadequate service.¹ IPH-owned carriers have acquired several carriers formerly owned by RailAmerica, Inc., and have brought significant new traffic to those lines. One IPH-owned carrier, Arizona Eastern Railway, recently obtained Board authority to construct a 12 mile-long railroad to

¹ See PYCO Industries, Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co., STB Finance Docket No. 34802 (served Jan. 26, 2006, and Jan. 11, 2008); Roseburg Forest Products Company, et al — Alternative Rail Service — Central Oregon & Pacific Railroad, Inc., STB Finance Docket No. 35175, currently pending; and PycO Industries, Inc.—Feeder Line Application—Lines of South Plains Switching, Ltd. Co., STB Finance Docket No. 34890 (served Aug. 31, 2007).

serve a newly constructed copper smelter in Arizona.² Simply stated, when IPH acquires a new line or company it has done so for sound business reasons.

With that background, IPH saw a business opportunity in 2006 when it decided to purchase a 4.5 mile long line of railroad from Canadian Pacific Railway known as the C&E line.³ The Kingsbury Branch and the Lakewood Avenue Segment constitute a portion of that acquisition. Subsequently, CTR has added two more lines of railroad to its system in the Chicago area.⁴ The City's Petition is correct insofar as it states that these two lines of railroad are located in or run parallel to two city streets, Kingsbury Street and Lakewood Avenue, respectively. Moreover, the City is correct in stating that the character of the neighborhood has become more residential and retail in nature over the years. But that is the limit of the parties' agreement on the facts. The City neglects to note that the subject railroad long preceded by many years the current "gentrification" of a once industrial neighborhood.

² Arizona Eastern Railway, Inc.-Construction Exemption-In Graham County, AZ. STB Finance Docket No. 34836 (served June 15, 2009).

³ Chicago Terminal Ry.-Acq. & Oper. Exempt.-Soo Line R. Co. d/b/a. Canadian Pacific Ry., STB Finance Docket No. 34968 (served Dec. 22, 2006).

⁴ Chicago Terminal Ry.-Acq. & Oper. Exempt.-Lines of Union Pacific Railroad Company and Canadian Pacific Rail System at Elk Grove Village, Cook and DuPage Counties, IL., STB Finance Docket No. 35005 (served March 30, 2007) and Chicago Terminal Railroad - Lease and Operation Exemption - Soo Line R. Co. d/b/a. Canadian Pacific Ry., STB Finance Docket No. 35101 (served Nov. 30, 2007).

ARGUMENT

Before addressing the City's specific waiver and exemption requests, CTR urges the Board to examine and deny this Petition in light of the substantial recent body of law involving adverse abandonment requests. In view of the Board's case load and limited staff, it should reject out of hand preliminary filings associated with adverse abandonment requests where it knows that precedent will require denial on the merits. Failure to do so will constitute a waste of the Board's resources as well as cause CTR to devote unnecessary management time and to expend unnecessary legal fees on this matter.

Adverse abandonment applications are subject to the same public convenience and necessity standard applicable to carrier-initiated abandonments. That standard is whether the present or future PC&N requires or permits the proposed abandonment. New York City Eco. Dev. Corp. – Adverse Abandonment – New York Cross Harbor R.R. in Brooklyn, NY, STB Docket No. AB-596 (served May 12, 2003), reversed on appeal in N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180, 1182 (D.C. Cir. 2004), hereafter cited as Cross Harbor. In applying this standard in the adverse abandonment context, the Board has stated that it must consider whether there is a present or future public need for rail service over the line

and whether that need is outweighed by other interests. See discussion in Cross Harbor at 1183.

As a general rule, the Board has historically denied adverse abandonment applications involving actively used rail lines. It has done so when a carrier has expressed a desire to continue operations and taken reasonable steps to acquire traffic. Salt Lake City Corporation-Adverse Abandonment in Salt Lake City, UT, STB Docket No, AB-33 (Sub-No. 183), (slip op. served March 8, 2002), hereafter cited as Salt Lake City. It will deny an application in the absence of current traffic where there is evidence of potential future shippers or traffic. City of South Bend, IN, et al v. Surface Transportation Board, et al., ___ F.3d ___ (D.C. Cir. 2009), slip. op. at 5, hereafter cited as South Bend. The Board has also denied adverse abandonment applications when the railroad requires the trackage that is the subject of the application for operational reasons. Salt Lake City at 8. In determining whether to grant an adverse abandonment request, the Board considers such public interest factors as urban redevelopment and citizen safety. But those considerations are but one factor to be weighed against the line's continued use for railroad purposes. Cross Harbor at 1186; South Bend at 8.

Turning to the facts of this case, CTR submits an affidavit by its President Edwin Ellis. As he notes, CTR has owned the entire C&E Line since December 2006, a mere two and one half years. Ellis Affidavit at 1. It has been actively soliciting the movement of freight over these lines. CTR plans to use the subject street trackage for transloading freight between trucks and rail cars. Moreover, CTR needs the subject track for operational reasons, specifically to store freight cars until shippers are ready to receive them at their sidings for loading or unloading. Ellis Affidavit at 2-3. As Mr. Ellis notes, the recent economic recession has reduced shipping volumes by several CTR customers located on the C&E Line. CTR lacks space in its yard to store freight cars that would normally be moving on the national rail system handling shipper traffic. Accordingly, CTR uses the subject trackage to store extra cars until its customers are ready to receive them for shipments. Ellis Affidavit. at 3.

The City alleges in its Petition that it has received complaints about personal injury and property damage to motorists, bicyclists, and pedestrians without providing any substantiation. City Petition at 3-4. And then it asserts what CTR perceives is the motivation behind its proposed adverse abandonment application: the presence of the trackage in the street will

substantially increase the cost of reconstruction and/or alignment of the affected streets slated for 2009. City Petition at 4.

Regarding safety, the STB has long considered such community "quality of life" issues and finds that they do not outweigh the overriding federal interest in maintaining rail lines as part of the interstate rail network. Salt Lake City at 9. CTR will work with the City to ensure the safety of its operations to the greatest extent possible. While the Board has regarded track removal as a valid public interest justification for reducing the cost of highway construction or rehabilitation in adverse abandonment proceedings, it has noted that such public needs are just one factor to be considered along with the need to preserve rail service for the public in determining whether to grant an adverse abandonment. Seminole Gulf at 5-6; South Bend at 8 (in both cases the STB weighed the public interest benefit in removing track against the need for continued rail service and then denied the abandonment).

Chicago's allegations ignore the simple fact that the railroad long preceded the current neighborhood uses. The subject lines were originally built by the former Chicago, Milwaukee, St. Paul, and Pacific Railroad Company well over one hundred years ago to serve local industry in the

area. Accordingly, the community took their property subject to the railroad's historic neighborhood presence.

Chicago wants the Board to believe that there has been no rail traffic on the Kingsbury Branch for many years. City Petition at 4. The fact that a line that is the subject of an adverse abandonment has had no traffic in years is no basis for granting an adverse abandonment if the affected carrier is actively seeking to develop traffic. South Bend; Yakima Interurban Lines Association Adverse Abandonment in Yakima County, WA, STB Docket No. AB-600 (served Nov. 19, 2004). Chicago suggests that CTR "contrived" a freight shipment for the purpose of opposing a future adverse abandonment application by a private developer. Specifically, the City speculated without providing any proof that CTR persuaded a wood company located near Division and Halstead Streets to ship firewood by rail so that it would be in a better position to oppose this abandonment. City Petition at 4. CTR seeks to develop and handle business in its role as a common carrier. It has not contrived any traffic movements. The Board should treat the City's allegations as pure speculation.

THE SPECIFIC WAIVER AND EXEMPTION REQUESTS

49 CFR 1152.21 (form of public notice requirements).

While CTR vehemently opposes this Petition, it does not object to allowing Petitioners to use their proposed notice instead of the format required by the Board's regulations except insofar as references to the offer of financial assistance and environmental and historic provisions are concerned. CTR would require that these references be retained and Petitioners comply with these provisions.

Waiver of 49 CFR 1152.20(a)(2). service on significant rail users.

CTR opposes this request insofar as it needs this line to serve four customers on contiguous trackage as described in Mr. Ellis' Affidavit at page 2. Those customers are Big Bay Lumber, Sipi Metals, General Iron, Finkl Steel.

Waiver of 49 CFR 1150.20(a)(2)(xii). service on duly certified labor organizations. While CTR vigorously opposes this Petition, CTR has no objection to this request as its employees are not represented by a duly certified labor organization.

Waiver of 49 CFR 1152.20(a)(3), posting at stations.

While CTR vigorously opposes this Petition, it has no objection as to waiving this requirement as there are no stations on the Line. CTR crews report for duty at Union Pacific Railroad's North Avenue Yard.

49 CFR 1152.10-14, 1152.24(e)(1)(System Diagram Map requirements). CTR objects to this request because it would expedite the Board's handling of this controversial request. The additional 60 day delay occasioned by requiring the City to file a System Diagram Map with the Board before submitting an abandonment application in this controversial proceeding would afford the parties and the public the additional time needed to resolve this matter outside of litigation. Those negotiations would be consistent with the Board's policy of preferring voluntary solutions to regulatory ones.

Contents of the application, 49 CFR 1152.22(a)(4) and (5) and 1152.24(e)(1) and also 49 CFR 1152.10-14 (generally pertaining to system diagram map requirements). CTR strongly objects to a waiver of 49 CFR 1152.22(a)(4) requiring a System Diagram Map or narrative. This requirement is not onerous and is necessary to inform the public. See CTR's comments above regarding System Diagram Maps.

Contents of application. 49 CFR 1152.22(b)-(d)(contents of application to include certain description of condition of line, service performed, and traffic, cost, and revenue information). Despite its opposition to this Petition, CTR has no objection to this request because it recognizes that the City has no access to information concerning the condition of the line, the service performed, or the economics of CTR's operations over it.

Content of the application. 49 CFR 1152.22(i). Federal Register notice. While CTR vigorously opposes this Petition, it has no objection to allowing Petitioners to use their proposed Federal Register notice instead of the form required in the Board's regulations except insofar as references to the offer of financial assistance and environmental and historic provisions have been deleted. CTR would require that these references be retained and Petitioners required to comply with these provisions.

49 CFR 1152.24(f). 1152.29(e)(2)(consummation-related). Despite its opposition to the Petition generally, CTR does not object to a waiver of this provision.

Waiver of 49 CFR 1152.22(f). 49 CFR 1105. Environmental and Historic Regulations. CTR is adamantly opposed to this request. Abandonment of the subject trackage would inhibit CTR's ability to develop

and handle traffic on its railroad and meet its common carrier obligations. It would almost be tantamount to granting the application on its merits. Little need be said about the environmental benefits of rail transportation over competing modes because they are so well known and accepted by both the Board and the public generally. Waiver of this requirement would not allow the Board to fulfill its responsibilities under the Rail Transportation Policy goals of the ICC Termination Act, the National Environmental Policy Act, and the National Historic Preservation Act. Moreover, to the best of CTR's knowledge, the Board has never granted any request to waive its environmental and historic regulations in an adverse abandonment proceeding.

49 U.S.C. 10904 and 10905; 49 CFR 1152.27-9 (offer of financial assistance, public use, and interim trail use provisions). Despite its opposition to the Petition generally, CTR has no objection to exempting Petitioners from compliance with or allowing waivers from provisions dealing with public use conditions and rail trails. However, CTR is unalterably opposed to any attempt to seek an exemption under 49 U.S.C. 10502 from the OFA provisions of 49 U.S.C. 10904(d)-(f) and a waiver of the implementing regulations at 49 CFR 1152.27.

As a general proposition, section 10502 provides that the Board "shall exempt a person, class of persons, or a transaction or service whenever [it] finds that the application in whole or in part of a provision...(1) is not necessary to carry out the transportation policy of section 10101 of this title; and (2) either-(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." CTR concedes that Chicago's OFA exemption request meets the second part of the statutory test (the transaction involves a very short segment of railroad handling a modest amount of traffic and there is no need here to protect shippers from the abuse of market power). However, Chicago's request, if granted, would violate the transportation policy of section 10101 of the Act: the Board's "statutory duty to preserve and promote continued rail service." Western Stock Show Ass'n - Abandonment Exemption - in Denver, CO, 1 S.T.B. 13 (1996). The Board and the Interstate Commerce Commission before it have granted exemptions from the offer of financial assistance provisions of 49 U.S.C. 10904 from time to time, but only when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.⁵ Board adverse abandonment precedent emphasizes the need to

⁵ See, The Kansas City Southern Railway Company - Abandonment Exemption:

protect lines as part of the interstate rail system. South Bend at 5-6. Other than some generalized statements about safety considerations and the allegation that removal of in-street trackage will substantially reduce the cost of reconstruction or realignment of the affected streets, the Petitioners here cite no specific public purpose for which they would use the railroad right of way.⁶ Moreover, CTR will provide detailed evidence of a continuing need for rail freight service in its Protest and in any OFA it files. Simply stated, the Board should not grant Chicago's request for an exemption from the offer of financial assistance provisions of 49 U.S.C. 10904 and a review of the implementing regulations insofar as it has not satisfied the first element of its exemption request.

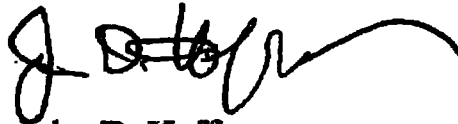
Line in Warren County, MS, STB Docket No. AB-103 (Sub-No. 21X), (served Dec. 12, 2007) slip op. at page 4 and cases cited therein; K & E Railway Company--Abandonment Exemption--In Alfalfa, Garfield, and Grant Counties, OK, and Barber County, KS, STB Docket No. AB-480X (served Dec. 31, 1996) slip op. at 4, citing Southern Pacific Transportation Company--Discontinuance of Service Exemption--In Los Angeles County, CA, ICC Docket No. AB-12 (Sub-No. 172X), et al., (served Dec. 23, 1994); Missouri Pacific Railroad Company--Abandonment--In Harris County, TX, ICC Docket No. AB-3 (Sub-No. 105X) (served Dec. 22, 1992); Chicago & North Western Transportation Company--Abandonment Exemption--In Blackhawk County, IA, ICC Docket No. AB-1 (Sub-No. 226X), et al., (served July 14, 1989); and Iowa Northern Railway Company--Abandonment--In Blackhawk County, IA, ICC Docket No. AB-284 (Sub-No. 1X) (served Apr. 1, 1988).

⁶ In Cross Harbor, *supra*, 374 F.2d 1177 (D.C. Cir. 2004), the Court of Appeals vacated and remanded a Board decision granting an adverse abandonment over the railroad's opposition noting that the adverse abandonment applicant had not established any specific public purpose.

CONCLUSION

CTR opposes the City's Petition for Waiver and Exemptions and requests that they be denied. Should the Board allow this request, CTR requests that certain specific provisions be denied for the reasons identified in this Reply.

Respectfully submitted,



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Counsel for
Chicago Terminal Railroad

Dated: June 30, 2009

**AFFIDAVIT OF
EDWIN E. ELLIS**

Edwin E. Ellis, being duly sworn, deposes and states as follows:

My name is Edwin E. Ellis. I am President and Chief Executive Officer of Iowa Pacific Holdings, LLC, a short line railroad holding company, and Permian Basin Railways, Inc. ("Permian"), its wholly owned subsidiary. My business address is 118 South Clinton Street, Suite 400, Chicago, IL 60661.

As IPH's chief executive officer, I have overall responsibility for the operating, marketing, and administrative functions of each of its short line railroad subsidiaries. Chicago Terminal Railway, Inc., is one of Permian's six class III short line railroad subsidiaries. I am intimately familiar with CTR's operations and opportunities and am qualified and authorized to submit this statement in support of CTR's Reply to the Petition for Partial Waiver of Abandonment Regulations and Exemptions filed by the City of Chicago (the City" or "Chicago") with the Surface Transportation Board.

The City's Petition involves a portion of a line of railroad that CTR acquired in December 2006 known as the "C&E Line." I attach to my statement a map that depicts the subject trackage in relation to the rest of the C&E Line and the shippers it serves.

The City alleges that "there is no present or reasonably foreseeable future need for rail service on the track segments it seeks to abandon." This is not accurate.

CTR presently serves four customers on the entire C&E Line. Those customers are Big Bay Lumber, Sipi Metals, General Iron, and Finkl Steel. Although there are no customers *at present* on either the Kingsbury Branch or the Lakewood Avenue Segment, CTR is working aggressively to market these locations to potential customers. Specifically, CTR has marketed to several potential transload users the availability of a small parcel of land it owns at the intersection of Kingsbury and Division Streets on the Kingsbury Branch. One of these opportunities involves a rail-to-truck transload of biodiesel. CTR recently used the line for a test shipment of firewood for a potential customer, to demonstrate that this location is open and available to be used to load cars. On the Lakewood Line, CTR also expects to start transloading traffic at a location on Lakewood Street near Diversey. The transloading of railcars in the middle of a street is not an unusual practice on this line. Our customer, Big Bay Lumber, identified above, transloads 100% of its rail cargo in the middle of N. Cherry Ave., just south of Division Street on Goose Island, on another segment of CTR's C&E Line.

CTR also requires access to the subject trackage for operational reasons. CTR leases a fleet of 52-foot gondola cars used for serving Sipi Metals, General Iron, and Finkl Steel. Normally these cars are loaded and moved by CTR for interchange with CTR's class I railroad connections. However, traffic levels for these customers are down due to the current recession. CTR lacks space in its railroad yard to store all of these cars and has no choice but to store them on the subject rail lines awaiting customer loading. Upon receipt of a customer order, CTR then retrieves the needed car or cars for spotting at the customer siding and then returns the remaining cars back to the subject trackage awaiting future needs. CTR is working with its connecting railroads to develop rail movements for these cars, not only with these customers but with other potential users.

CTR represents the only rail freight service in this area of Chicago. The City of Chicago has developed a number of industrial areas in older parts of the city, and has promoted the idea that Chicago is a friendly place for industry. The City has invested considerable time and effort in developing this industrial base to create jobs. When CTR purchased the C&E line, it was the first time that a railroad had assisted the City in seeking industry. Serious Materials, a producer of sustainable and energy-efficient building materials, recently acquired the facilities of Republic Windows and

Doors, a company on Goose Island that recently failed in the recession. CTR has worked closely with Serious and railcars of lumber will be received shortly. Use of rail transportation will lower Serious' costs and increase the competitiveness of their products. The availability of the Kingsbury and Lakewood trackage as a "safety valve" for holding inbound loads is just as important as its use for our leased cars as described above.

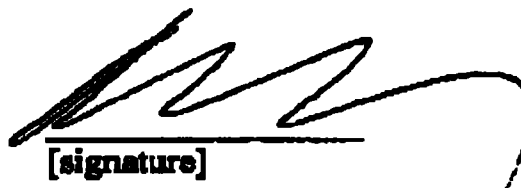
Further, on the Kingsbury Branch there are businesses and undeveloped vacant lots that are still being considered for development. Kingsbury is zoned for development that could include rail-oriented businesses, and is next to the Chicago River making it even more attractive to businesses that can potentially use rail or water.

On the Lakewood Branch, it is true that Peerless Confection, the last regular freight user on the line, is no longer in business. But again, the Peerless property has not been built on. While it might seem oriented toward condo development, the reality is that there are many industrial businesses on the North Side of Chicago. It is possible that a rail user may locate in the vacant property at Diversey and Lakewood, or that a nearby industry may conclude, with higher fuel prices and new legislation concerning greenhouse gas emissions, that rail loading with CTR on the Lakewood Branch is significantly better than shipping directly by truck.

In conclusion, rather than move toward abandonment of this vital and highly-valuable urban corridor, the City of Chicago should instead be encouraging and developing rail transloads at both ends of this line, making it easier for Chicago businesses to comply with coming climate legislation, and giving them transportation options.

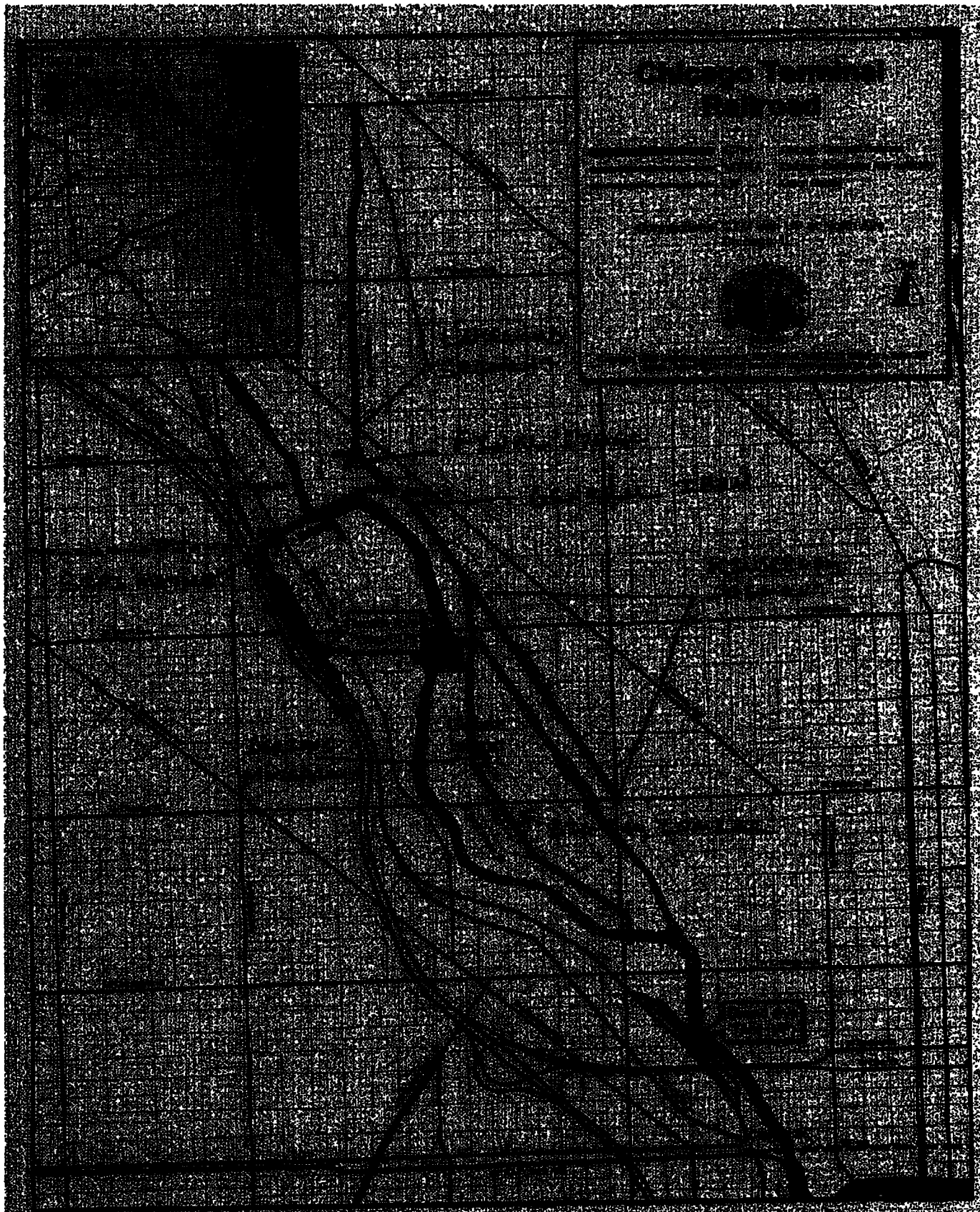
Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

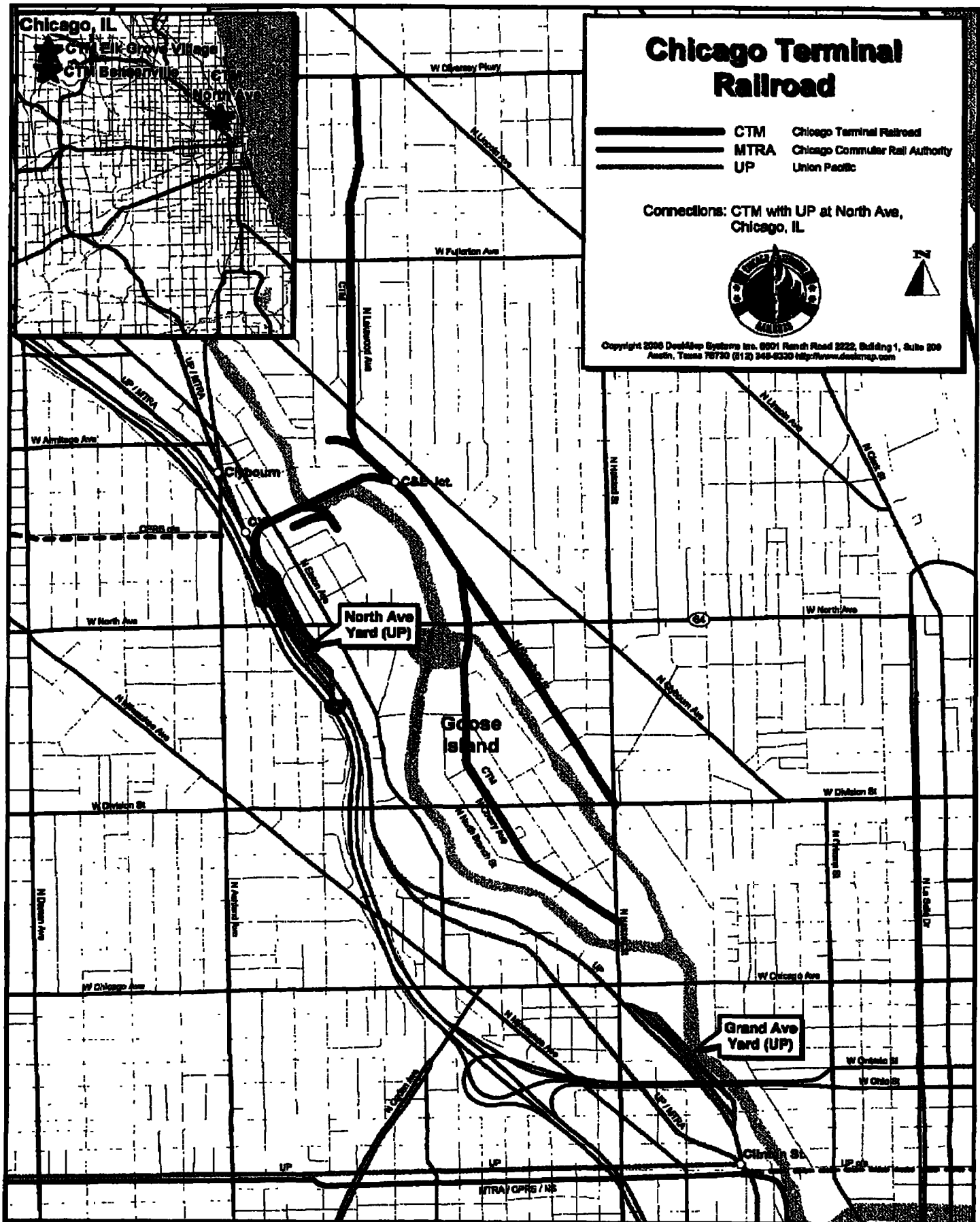
Executed on:



[signature]

EDWIN E. ELLIS





CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify on this day of June 30, 2009, a copy of the
Reply to Petition for Partial Waiver of Abandonment Regulations and For Exemptions to
be served electronically and by first-class mail to the following:

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